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NTSB Order No. EA-4387

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of July, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. THEODORE JOSEPH STEWART, Respondent.	Docket SE-14084

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on June 19, 1995, at the conclusion of a five-day evidentiary hearing.[1] By that decision the law judge reversed an emergency order of the Administrator revoking respondent's airline transport pilot (ATP) certificate for his alleged

[1]An excerpt from the hearing transcript containing the initial decision is attached.

violations of section 61.59(a)(1) and (2) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61).[2] For the reasons discussed below, the appeal will be denied.[3]

The charges in this proceeding resulted from a nationwide investigation by the Administrator into suspected "type rating trading" by and among ATP certificate holders who are authorized by the FAA either by the scope of their employment or by delegation to issue such ratings to others. The Administrator's suspicion, as best we can discern it from the record in this case, is that some FAA inspectors and some designated pilot examiners (DPE) have been issuing each other type ratings for various aircraft without requiring an adequate or proper demonstration of knowledge and proficiency for the so-called "add-on" ratings. Respondent, who holds more than fifty type

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[2]FAR sections 61.59(a)(1) and (2) provide as follows:

> §61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**
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> (a) No person may make or cause to be made--
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part;
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part[.]

The Administrator's order also charged that respondent's violations of this regulation demonstrated that he lacked the good moral character required of an airline transport pilot certificate holder under FAR section 61.151(b).

[3]The respondent has filed a reply brief opposing the appeal.

ratings, is both a full-time captain for American Airlines and a DPE. The Administrator's evidence in this case, while not establishing that any rating respondent had given or received was in fact the fraudulent *quid pro quo* for ratings given or received by others, did identify some questionable circumstances as to two type ratings he had obtained from others (one an FAA inspector and one another DPE) and of one type rating he had issued to another ATP certificate holder. The respondent's evidence persuaded the law judge, however, that although one of the ratings may have been issued to respondent in error, no intentionally false or fraudulent statements had been made, or had been caused to be made, by the respondent in either the applications for[4] or the temporary certificates issuing any of the three ratings.[5]

The law judge's decision recounts the parties' evidence in ample detail and the Administrator's appeal does not take issue with the accuracy of that review. Consequently, we see no need to summarize it in depth here, and will refer to it only to the extent necessary to discuss the Administrator's contentions.[6] It is worth observing at this point, nevertheless, that the parties' evidence in this matter was not really in conflict in the

[4]See FAA Form 8710-1, Airman Certificate and/or Rating Application.

[5]See FAA Form 8060-4, Temporary Airman Certificate.

[6]A copy of the Administrator's May 16, 1995 Emergency Order of Revocation, which served as the complaint in this action, is attached.

traditional sense: the Administrator adduced documentary evidence from which it could be inferred that the ratings had not been obtained as represented, and the respondent advanced testimonial evidence to the effect that no inference or conclusion of impropriety was warranted. The Administrator produced no witness to refute the testimony of the respondent's numerous witnesses, including those responsible for the preparation of the documents the Administrator so heavily relied on to establish his case, and the law judge found their accounts, both as to how the testing for the ratings was accomplished and as to why the documents relied on by the Administrator should be discounted, to be uniformly consistent and believable. In such circumstances, a challenge to the law judge's credibility assessments, to be successful, would have had to do more than just insist that the law judge should have weighed the evidence differently; that is, that he should have given more weight to the documents and less weight to the testimony produced to explain them. Rather, to overturn the law judge's credibility findings in this matter it was necessary for the Administrator to demonstrate not that it was unlikely, in view of certain documentary evidence, that the ratings were acquired in the manner testified to by the respondent and his witnesses, but, essentially, to show that the ratings could not have been so acquired. The Administrator's case fell short of doing so.

Two of the three ratings at issue in this case involved aircraft operated by the Drug Enforcement Administration (DEA).

The Administrator charged, in effect, that a rating respondent received in November 1993, in a DEA CASA CA-212 aircraft, from a DPE employed by the DEA named Gordon W. McKelvey, and a rating the respondent approved for a different DEA official, Gary Bennett Wheeler, in a DEA Lear Jet in June 1993, were bogus. Although the Administrator referenced other circumstances arguably consistent with his view that no proper testing for the ratings had taken place,[7] his chief evidence in support of his position that the documentation for the ratings had been falsified are DEA records (aircraft flight logs and mission reports) pertaining to the usage of the two aircraft on the dates when the ratings check rides assertedly took place. The Administrator maintains that because those records indicate that each of the aircraft logged less total time for the dates in question than is reflected on the ratings applications of respondent and Mr. Wheeler as the time periods consumed for the check rides in the aircraft alone, the law judge did not adequately consider those records and, in effect, therefore, his acceptance of the respondent's and his witnesses' testimony about the check rides must be rejected. We disagree.

The law judge's refusal to give the flight times listed in the DEA records dispositive weight in no way suggests a failure to adequately consider that evidence, as the Administrator maintains. To the contrary, since the DEA agents who prepared

[7]Such as the absence of respondent's name on the DEA documents concerning the flights and the fact that Mr. Wheeler's personal logbook noted training rather than a check ride.

those records disavowed the accuracy of their noncontemporaneous flight time estimates on the logs at the hearing, the Administrator's insistence that the law judge had to give the logs, which are prepared for DEA's internal uses only, more weight than their authors' testimony about them would justify amounts to no more than a disagreement with the law judge as to credibility of the agents on this matter and on the thoroughness and duration of the two flight checks they claimed to have witnessed while aboard the aircraft. In this connection, we recognize that the testimony of some of the DEA agents who appeared on respondent's behalf may have been influenced by concern over the impact their recollections may have for them in pending or imminent enforcement actions against their certificates. However, the fact that the law judge found their testimony credible, notwithstanding his awareness of the self-interests the agents might have had reason to seek to protect, dictates that more, not less, deference should be accorded his resolution of credibility issues, for it undoubtedly reflects a heightened attention to witness demeanor as an indicator of truthfulness and dissembling.

The third rating at issue in this proceeding is one respondent received for a Cessna CE-650 aircraft on April 12, 1993, after passing a check administered by an FAA inspector, Alfred M. Hunt, in a Flight Safety International (FSI) simulator. The Administrator contends that respondent intentionally falsified his application for this rating because it represented

that he was qualified to take a simulator test when, in fact, he had not taken FSI's FAA-approved ground and simulator training course.[8] As to the falsification charge relating to this rating, the respondent denied knowing that he could not take the simulator check without having completed a formal course of study, a belief that was shared by Inspector Hunt who, the record indicates, did not know respondent before administering the check ride to him and, on the same date, to a DEA agent, David Kunz, who had earlier trained with the respondent in the simulator. The Administrator asserts that respondent's testimony in this regard is inherently incredible. The law judge found otherwise.

The law judge concluded that the Administrator's circumstantial evidence, the particulars of which he describes at length in his decision, established at best that respondent *should have known* that he could not qualify for the Cessna rating with a simulator check alone, not that it proved that respondent knew that he could not. In recognition of precedent holding that the intent element of an intentionally false or fraudulent statement under the regulation cannot be satisfied simply by a showing that an airman ought to have known of the falsity of an entry, see, e.g., Administrator v. Motrinec, NTSB Order EA-3296 (1991), the law judge, believing that the respondent had not purposely set out to evade any licensing requirement, found no violation. The attack on that finding, once again, invites us to

[8]The FAA Form 8710-1 respondent filled out for this rating correctly reflected that he had no flight time in a Cessna CE-650 aircraft.

secondguess a credibility judgment by the law judge in favor of the Administrator's view as to how the evidence should be weighed. However, since it is possible, and there was no direct evidence to the contrary, that the respondent was not actually aware of the necessity for ground training, it makes no difference that the Administrator thinks such ignorance to be improbable or implausible for an airman with respondent's background and experience. The law judge has resolved that issue, and nothing in the Administrator's brief demonstrates that that resolution was arbitrary or clearly erroneous.[9]

In light of the foregoing we will sustain the law judge's dismissal of the order of revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied, and

2. The initial decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member of the Board, concurred in the above opinion and order.

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[9]The Administrator's reliance on Administrator v. Chirino, 5 NTSB 1661 (1987), is misplaced. In that case we concluded that the law judge had made a "critical" mistake in reviewing certain testimony that invalidated his credibility determination to the effect that the respondent believed that he could obtain a Boeing 727 type rating just by passing a simulator check. Our own evaluation of the weight to be accorded the evidence on that score led us to conclude that the respondent had knowingly caused certain falsifications to be made on his application for the rating. In this case, by contrast, we have no valid basis for rejecting the law judge's determination that respondent testified truthfully and, accordingly, no reason to determine how we would weigh the evidence in the absence of a controlling ruling on credibility.